



# Protection Of Sensitive Business Information

## Non-Disclosure Agreements - What Works, What Doesn't Work and Why

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Most businesses create or maintain and use non-technical, business informational data which is held with some degree of confidentiality to prevent unauthorized disclosure. This information can consist of internal financial data, profit and loss information, debt structure and financial projections, profit margins and manufacturing costs, pricing and discount formulas and structure and bidding procedures, and pricing, distribution and marketing plans.

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hat is common to all of this non-technical business data is that such information may not be considered by a court to rise to the level of trade secrets. Should that prove to be the case, an employer's proprietary business information will not be protected against disadvantageous disclosure and use by a former employee **UNLESS** that employee had entered into a valid and enforceable covenant precluding post-employment disclosure. If such a covenant is not in place, or if an existing covenant is found to be overbroad or otherwise unenforceable, the former employee will be free to disclose and use his or her former employer's business information for such purposes as he or she sees fit.

**Misuse of covenants not to compete.** Experience has shown that many businesses utilize covenants not to compete as the contractual vehicle with which to seek to prevent disclosure of proprietary business information. This is a serious and generally unnecessarily expensive mistake -- using a nuclear bomb where a flyswatter would be appropriate.

Covenants not to compete have the purpose of preventing competition and are viewed as restraints on trade. They are not favored as contrary to public policy and are subject to substantial judicial scrutiny when sought to be enforced. Further, covenants not to compete, as restraints on trade, will be upheld and enforced only when necessary to protect an employer's legitimate business interests, such as a near-permanent relationship with existing customers, and then only to the extent necessary to protect those interests. Thus, a covenant not to compete must be limited in time and geographic scope and not exceed restraints necessary to protect the employer's legitimate interests. Should the covenant prove to be overbroad, a court need not blue-pencil or rewrite the restrictions down to a reasonable scope and may decline to enforce the covenant as unreasonable.

Covenants not to disclose, on the other hand, are not intended to prevent competition, but to preserve the confidentiality of an employer's proprietary business information. Covenants not to disclose, therefore, are subject to a substantially lower degree of judicial scrutiny. Further, due to the clear difference in the two types of post-employment restraints, covenants not to disclose generally need not contain "reasonable" (or any) geographic or time limitations. As a result of these material differences, covenants not to disclose have proven to be more readily enforceable in the courts and enforceable in proceedings where judicial inquiry is more limited to questions of whether the information in question is truly not in the public domain and has been the subject of reasonable attempts to ensure its confidentiality.

### WHAT WORKS, WHAT DOESN'T WORK AND WHY

**If you don't keep it confidential, no court will.** Courts will enforce non-disclosure agreements only if the employer itself treats its proprietary business information as confidential. As non-technical business information may not rise to the level of trade secrets, protectable without an underlying non-disclosure agreement, a valid and enforceable non-disclosure agreement must be in place. Procuring a non-disclosure agreement, however, is not enough, the employer must also take reasonable steps to ensure the confidentiality of its business information. Such steps are varied, determined by the nature of the business, but can include restricted access to computerized data by password control, keeping track of hard copies of the data and otherwise restricting access to the information to those having a need to know. Only if appropriate steps are taken to actually preserve the confidentiality of the information will a court enforce the contract to restrict disclosure, for a failure to keep the information confidential will be deemed a waiver of its confidentiality.

**Non-disclosure must be limited to proprietary business information.** Although a non-disclosure agreement will not be subjected to the same degree of judicial examination as a covenant not to compete, nonetheless the restriction against disclosure cannot extend beyond that necessary for the protection of legitimate business interests of the employer, in this case, the protection of proprietary business information held confidential against unauthorized disadvantageous disclosure. The non-disclosure agreement, therefore, should set forth more than a mere vague and broad statement as to the nature of the information not to be disclosed, such as "business practices", "methods or means" and the like, as a court reviewing the agreement would then be unable to determine whether protectable interests exist. An agreement not to disclose which describes the information subject to the restraint with specificity is one which a court will enforce if otherwise appropriate. A vague description of protected information or an attempt to restrain disclosure of information in the public domain or generally available within the employer's industry will result in an unenforceable covenant.

**The covenant must be supported by real consideration.** Often overlooked is the fact that an agreement not to disclose is a contract and, like other contracts, must be supported by real consideration. Therefore, if the non-disclosure agreement is not made at the time employment commences, an employee must receive something of value in exchange for his or her new obligation not to disclose (a promotion, stock options, etc.). If the employee is at-will, continued employment will support the agreement only if that continued employment is "substantial" in nature, that is, if it continues for some period of time. A non-disclosure agreement procured shortly before an employee is terminated is of little or no value. ■

*These are general observations as to the manner in which the Circuit Courts generally deal with covenants not to compete and post employment restraints. The space allotted is not sufficient to address this very broad topic in any detail. You should consult counsel regarding any specific application. For more information, Henry Novoselsky can be reached at 312.621.4400 or HNovoselsky@SNSFE-law.com.*

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